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IN THE

Supreme Court of the United States

No. 71-632

A. DANA HODGDON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

A. DANA HODGDON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner A. Dana Hodgdon respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered against A. Dana Hodgdon in the case of *Haight & Co., Inc., A. Dana Hodgdon et al. v. Securities and Exchange Commission* on June 30, 1971.

OPINIONS AND ORDERS BELOW

The unreported order of the Court of Appeals for the District of Columbia Circuit is reprinted as Appendix A hereto, p. 1a. The Findings and Opinion of the Securities and Exchange Commission and its Order Imposing Remedial Sanctions are reprinted as Appendix B, p. 1b.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 30, 1971. A timely petition for rehearing was denied on August 12, 1971 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission may, consistent with its statutory powers and the due process clause, impose the penal sanction of permanent disbarment from the securities business where the person disbarred was accused of having engaged in fraudulent transactions with customers but the names of the customers and the specific circumstances of the allegedly fraudulent actions had not been revealed prior to the hearing.

2. Whether the Securities and Exchange Commission may, consistent with its statutory powers and the due process clause, impose the penal sanction of permanent disbarment from the securities business on the basis of conduct that had not previously been declared a violation of the law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15

§77q. Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

§78j. Manipulative and deceptive devices.

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. (June 6, 1934, ch. 404, § 10, 48 Stat. 891.)

§78o. Over-the-counter markets; registration of brokers; information and reports.

...

(b)(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated —

...

(D) has willfully violated any provision of the Securities Act of 1933, or of the Investment Advisers Act of 1940, or of the Investment Company Act of 1940, or of this chapter, or of any rule or regulation under any of such statutes.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or the Investment Advisers Act of 1940, or the Investment Company Act of 1940, or of this chapter, or of any rule or regulation under any of such statutes or has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this clause (E) no person shall be denied to have failed reasonably to supervise any person, if —

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to an order of the Commission entered pursuant to paragraph (7) of this subsection (b) barring or suspending the right of such person to be associated with a broker or dealer, which order is in effect with respect to such person.

. . .

(b)(7) The Commission may, after appropriate notice and opportunity for hearing, by

order censure any person, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in clause (A), (D) or (E) of paragraph (5) of this subsection or has been convicted of any offense specified in clause (B) of said paragraph (5) within ten years of the commencement of the proceedings under this paragraph or is enjoined from any action, conduct, or practice specified in clause (C) of said paragraph (5). It shall be unlawful for any person as to whom such an order barring or suspending him from being associated with a broker or dealer, is in effect, willfully to become, or to be, associated with a broker or dealer, without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him, without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care, should have known, of such order.

(c)(1) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such

devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

STATEMENT OF THE CASE

Petitioner A. Dana Hodgdon entered the securities business in 1953. In 1955 he established his own securities firm in Washington, D. C., known initially as Hodgdon & Co., a sole proprietorship, later as Hodgdon & Co., Inc., a corporation (hereinafter referred to as "the Company"). The Company was a registered broker-dealer, a member of the Philadelphia-Baltimore-Washington Stock Exchange and of the National Association of Securities Dealers, Inc.

It was Hodgdon's belief that the random buying and selling of securities did not produce satisfactory results for the average unsophisticated investor. He, therefore, embarked upon a policy of encouraging customers of his firm to develop a systematic investment program and advertised the Company as competent to render appropriate investment advice. The thrust of the advice generally given to customers was to change from the prevailing pattern of heavy reliance on so-called "blue chip" securities by placing about half of one's investment capital in mutual funds, with the other half distributed among real estate investments, "blue chips", speculative issues and special situations.

The practices of the Company were first criticized by the Securities and Exchange Com-

mission in a report submitted to Congress on April 3, 1963. House Doc. No. 95, Pt. 88th Cong., 1st Sess., at pp. 261-2. Almost three years later, on March 2, 1966, the Commission instituted proceedings against the Company and eleven individuals connected with it, including Hodgdon, accusing them, *inter alia*, of having offered and sold securities, from approximately May 1960 to June 1964 by means of untrue statements of material facts and omissions to state material facts and of having engaged in a course of business which operated as a fraud and deceit upon their customers. See Appendix C, p. 1c. Because of the broad and general character of the Commission's Order, the Company and the individual respondents filed a Motion for a More Definite Statement. See Appendix D, p. 1d. While parts of the motion were granted, the most crucial parts, the requests to identify the allegedly fraudulent actions with the clarity needed to enable the respondents to prepare their defense, were denied.

A formal hearing on the charges commenced on June 14, 1966 and continued for 108 days, concluding on July 27, 1967. The transcript was 13,530 pages in length. Over 1,100 exhibits were introduced.

On May 15, 1969, the Hearing Examiner entered his Initial Decision, in which he held that the respondents had violated the anti-fraud sections of the securities laws and imposed sanctions against the Company and the individual respondents. The sanction imposed on

Hodgdon was a lifetime bar from association with a broker or dealer.

The Company and the individual respondents then filed a petition for review of the Initial Decision by the Commission. Following such review, the Commission, on February 19, 1971, upheld the decision of the Hearing Examiner and, *inter alia,* affirmed the sanction imposed on Hodgdon. That decision, in turn, was appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed in a *per curiam* judgment.

REASONS FOR GRANTING THE WRIT

1. THIS CASE RAISES AN IMPORTANT QUESTION AS TO THE STANDARDS OF DUE PROCESS WHICH MUST GOVERN PROCEEDINGS OF THE SECURITIES AND EXCHANGE COMMISSION WHICH RESULT IN A PERSON'S PERMANENT DISBARMENT FROM THE SECURITIES BUSINESS.

Ever since its decision in *National Labor Relations Board v. Jones & Laughlin Steel Corporaton,* 301 U.S. 1 (1937), this Court has tended to refrain from striking down Congressional regulatory enactments on the ground that they violated substantive due process. At the same time the Court has been increasingly sensitive to laws and administrative actions which might deprive individuals of their civil liberties under circum-

stances which do not comport with standards of procedural due process. In this case, the two trends collide. On one hand the Securities and Exchange Commission has been entrusted with responsibility to regulate the securities industry in such manner as to assure purchasers of securities that they are being dealt with fairly. To reach that end, the Commission has been granted the power to impose sanctions on persons found to have violated the applicable laws and the regulations issued thereunder. If the Commission's proceedings are viewed as essentially civil in nature and regulatory in character, the Commission can properly be allowed a great deal of latitude in the administrative hearings through which it pursues its goals. If, on the other hand, the sanction imposed on a person at the conclusion of such hearing can have such an impact on his future life and his future standing in his community that it must be regarded as punitive in character, far stricter procedural standards must be observed.

This petition does not seek to subject to review the action of the Commission in imposing sanctions on the successor of Hodgdon & Co., Inc. which had the effect of putting that company out of business. But it does challenge the Commission's action in attaching to Hodgdon a "badge of infamy", *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952), in causing him "the loss of professional standing, professional reputation and of livelihood", *Spevack v. Klein*, 385 U.S. 511, 516 (1967), through administrative proceedings which violated the most elementary principles of due process.

That the sanction imposed on Hodgdon is punitive rather than regulatory cannot be questioned. Hodgdon has not previously been found to have violated the securities laws. Nor have actions such as those of which Hodgdon was here accused been previously found to constitute violations of the securities laws. There is no reason to believe that Hodgdon would not in the future proceed with utmost care in any work that he may do in the securities field. His enforced removal from the industry is thus not designed to protect the public but to punish him.

The power to impose the stringent sanction of a lifetime bar from the industry was given the Securities and Exchange Commission only relatively recently, by the Act of August 20, 1964, Pub. L. 88-467, 78 Stat. 570. Since that time the bar has been imposed in the following number of instances:

Fiscal Year	
1965	25
1966	68
1967	105
1968	53
1969	36
1970	49
1971	73.

The securities industry constitutes a large and vital segment of the American economy. More than 200,000 individuals are engaged

in it,[1] under the supervisory and regulatory authority of the Securities and Exchange Commission. The 1964 Act gave that Commission a most significant power over these thousands of men and women who hold professional positions in the industry, the power to bar them from their chosen profession for life. As the foregoing statistics demonstrate, the Commission has made full use of that new power. It can be expected to make use of it in the future, deeply affecting the lives of an increasing number of persons.

In the first three decades of its existence, the Commission, in exercising its regulatory function, became accustomed to methods and procedures which might have been questioned earlier if they had been applied in cases in which punitive sanctions could be imposed. Now that the power to punish through a sanction similar to disbarment has been granted it, the Commission has evidently failed to adopt new and tighter rules of procedure. Because of the broad sweep of the Commission's jurisdiction, because of its power to affect the freedom of individuals to engage in their chosen profession, it is most important that appropriate procedural guidelines be laid down for the Commission by this Court, within which the powers granted it in 1964 may be exercised.

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[1] The National Association of Securities Dealers alone has 4,380 member firms with about 200,000 individuals registered with these firms. In addition, there are firms and thus individuals regulated by the Securities and Exchange Commission that are not members of NASD.

In the past this Court has held that Constitutional safeguards protect government employees in proceedings for their removal from employment, *Wieman v. Updegraff, supra,* attorneys in disbarment proceedings, *Bradley v. Fisher,* 13 Wall. (U.S.) 335 (1872), *Spevack v. Klein, supra,* and aliens in deportation proceedings, *Jordan v. DeGeorge,* 341 U.S. 223 (1951). The Court has also held that the Constitutional safeguards protect an engineer in private employment whose future opportunity to earn a livelihood was endangered by the Government's revocation of his security clearance, *Greene v. McElroy,* 360 U.S. 474 (1959). The question posed by this petition is whether persons in the securities industry are to be accorded lesser rights at the hands of the Securities and Exchange Commission.

2. THIS CASE RAISES SIGNIFICANT AND RECURRING CONSTITUTIONAL QUESTIONS AS TO THE PROCEDURES FOLLOWED BY THE SECURITIES AND EXCHANGE COMMISSION IN HEARINGS WHICH RESULT IN THE IMPOSITION OF A PERMANENT BAR FROM THE SECURITIES BUSINESS.

(a) Fair Notice

The staff of the Securities and Exchange Commission initiated its investigation of the Company in 1962. It was on the basis of that investigation that the Commission, on March 2, 1966, issued an Order for Public Proceedings,

alleging that the Company, Hodgdon and ten other individual respondents had violated the securities laws.

In spite of the fact that the Commission staff had spent four years in preparing the case and was surely aware of the specific instances of violations which it believed it had uncovered, the Order for Public Proceedings consisted largely of vague generalizations, which provided the respondents with little more than an inkling of the nature of the case against them. Hodgdon, for example, was called upon to defend himself against the charge that he had induced "inexperienced and unsophisticated customers to repose complete trust and confidence" in the Company, had induced "customers, without regard to such persons' financial needs and objectives, to sell seasoned securities out of their investment portfolios and reinvest the proceeds in unseasoned and speculative securities in which respondents had direct and indirect interests", had endeavored "by the use of high pressure selling efforts to place customers in a position where they were asked to make hasty decisions to buy securities upon the basis of incomplete, untrue, deceptive and unsubstantiated representations." See Appendix C, p. 2-5.

Following the granting, in part, of a Motion for a More Definite Statement, the Commission staff identified thirty-six "unseasoned and speculative securities" but the request of the Company and the individual respondents for such crucial information as the names of the allegedly defrauded customers and for greater specificity as

to the charges was refused by the Hearing Examiner:

> "The order for proceedings specifies the nature of the violations charged, the subject matter of the alleged fraudulent representations and omissions.
>
> "Such information sought as the names of customers, the exact nature and factual details of each allegedly fraudulent act or omission or series of acts or omissions which together are alleged to constitute fraud, the nature of alleged deficiencies in salesmen's training, the nature of allegedly erroneous advice given to customers and, in general, the facts upon which [the Division of Trading and Markets] will rely are evidentiary matters which need not be specified prior to the hearing." Appendix E, p. 2-4.

One of the most elementary tenets of our system of law is that the accused be given notice of the charges against him in sufficient detail to enable him to prepare his defense. Thus, in *Fontana v. United States,* 262 Fed. 283 (8 Cir, 1919), the court declared:

> "The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair

> and reasonable opportunity to prepare his defense, is an indispensable element of that process." At 286.

And this Court noted in *United States v. Cruikshank*, 92 U.S. 542 (1876) that "[a] crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances." At 558. See also *Cole v. Arkansas*, 333 U.S. 196 (1948). That this principle does not only apply to criminal proceedings but also in proceedings similar to the one in issue here was the holding of this Court in *Re Ruffalo*, 390 U.S. 544 (1968):

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer....He is accordingly entitled to procedural due process, which includes fair notice of the charge." At 550.

Even in an administrative proceeding which does not involve the imposition of punitive sanctions "[t]here is a denial of procedural due process when the issues are not clearly defined." *National Labor Rel. Bd. v. Bradley Washfountain Co.*, 192 F. 2d 144 (7 Cir. 1951). See also *Bendix Corp. v. Federal Trade Commission*, No. 20687 (6 Cir., filed October 18, 1971).

Hodgdon and the other respondents did not ask for evidentiary material when they filed their Motion for a More Definite Statement, as the Hearing Examiner suggested. What they asked for was no more than "reasonable particu-

larity of time, place and circumstances" of their alleged violations of the law. The Commission's refusal to furnish such information deprived Hodgdon of that understanding of the Commission's case against him that would have been necessary to enable him to prepare a cohesive, point-by-point defense. It was thus in a Kafkaesque atmosphere that Hodgdon and his ten colleagues were put on trial, knowing merely that they were accused of having committed fraud in transactions which stretched over a period of fifty months. Only after the Commission staff had presented each segment of its well-prepared attack, was the defense able to scurry around for rebuttal evidence. Memories had to be refreshed, documents had to be unearthed, potential witnesses had to be identified and interviewed under circumstances which simply did not make it possible to present a comprehensive orderly case for the defense. Thus, this case poses the issue whether the Commission's failure to provide Hodgdon with adequate notice deprived him of the kind of opportunity to be heard in his defense which the due process clause requires.

That the experience of Hodgdon and the other respondents in failing to obtain adequate notice from the Commission of the charges against them is not unique is illustrated by *Jaffee & Company v. Securities and Exchange Commission*, 446 F. 2d 387 (2 Cir. 1971).[2]

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[2] Note also that the Hearing Examiner cited other decisions of the Commission in support of his ruling. Appendix E, p. 2-4.

In that case the court vacated a suspension order issued by the Commission, on the ground that the respondent had not had "'fair notice' of the claim lodged against it 'and the grounds upon which it rests.'" At 394.

It is evident that in this and other cases the Commission has exhibited a pattern of conduct which raises so serious a question of possible defiance of an elementary Constitutional principle, that of fair notice, as to justify review by this Court. Furthermore, the *Jaffee* decision adds the possibility of a conflict of circuits, requiring resolution by this Court.

(b) *Ex post facto* Rule-making.

In the thirty-seven years that have elapsed since its creation, the Securities and Exchange Commission has significantly raised the level of business ethics of the securities industry by gradually increasing the standards of conduct to which it will hold those who engage in the business of buying and selling securities. That these standards are not constant but are continuously evolving is freely admitted by the Commission. See *e.g.* House Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. Thus, in its decision in the instant case the Commission conceded that in determining the appropriateness of a particular sanction it considered, *inter alia*, "the ever-developing standards of the securities industry." (Emphasis supplied, Appendix F, p. 1)

If the Commission were to use its rule-making authority to define and redefine these "ever-developing standards", its actions might very well meet the test of constitutionality.[3] But, as the instant case illustrates, the Commission has more often than not escalated its standards on a case-by-case basis. It has done so by identifying new problem areas and then moving into them by proceeding against alleged violators in reliance on no more definite standards than those provided by the anti-fraud sections of the securities laws. It is in such adversary proceedings that the Commission has sought to break new ground and to lay down the latest set of the "ever-developing standards of the securities industry" by declaring a particular practice unlawful even though it may not have been so regarded in the past.

Conceivably the case-by-case procedure constitutes an effective and efficient mode of regulation, but is it constitutional? It would seem that where the Commission has only recently focused on a particular practice of the industry and, after consideration of the "ever-developing standards" has imposed severe administrative punishment for actions which had not been declared unlawful at the time they took place, the

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[3] That Congress expected the Commission to use its rule-making powers in applying the sanctions here in issue is suggested by the statutory provision for the imposition of sanctions on persons who "willfully...procured the violation by any other person of the Securities Act of 1933,...or of any rule or regulation under any of such statutes...." 15 U.S.C. §78o(b)(5)(E).

question arises as to whether this procedure meets the requirements of due process and whether Congress in enacting the laws under which the Commission functions can be presumed to have authorized the Commission to proceed in this manner.

The gravamen of the Commission's case against the Company and the individual respondents, including Hodgdon, was what the Commission called the "Scheme to Defraud 'Financial Planning' Clients". Appendix B, p. 2-4. [4]

The undisputed facts are, as indicated above, that the Company held itself out as competent in the field of financial planning, that financial-planning customers were encouraged to liquidate most of their blue-chip holdings and shift to mutual funds, real estate and other investments. In presenting their case to the Commission, the Company sought to demonstrate that the investment advice it had rendered had on the whole, proved profitable to its customers, that the diversified investments it recommended often performed better than blue-chip securities, that the Company's program was thus beneficial to the customers as well as to the Company. Responding to this argument, the Commission conceded in its opinion that it had not concluded that the investments recommended by the Company were "unsuitable". Appendix F, p. 1.

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[4] After its exhaustive review of more than four years of activity of the Company and the eleven individual respondents, the Commission found other violations as well, but particularly as to Hodgdon, the major emphasis was on the "Scheme".

But it found that the Company stood to gain more from the sale of these recommended investments than from other types of investments.[5] What the Commission then declared fraudulent *per se* was a mode of operation by which a broker-dealer holds itself out as giving financial planning advice and then urges an investment program from which it can earn a greater profit than if it were to choose from a broader list, even if the recommended investments are not unsuitable.

The securities laws prohibit "fraud", a term which is not further defined. Redefinition of the term beyond the practices which would have been deemed fraudulent at the time the securities laws were enacted has been gleaned from the decisions of the Commission which have provided us with the "ever-developing standards of the securities industry". But until its decision in this case, the Commission has always held that to constitute fraud a "self-enriching" transaction had to be shown as not to be for the customer's benefit.[6] Now the Commission is saying in effect that once an organization holds itself out as a financial planner, it may not recommend

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[5] Hodgdon has contested that allegation from the beginning and has contended that if all relevant factors were considered by the Commission, the transactions here in issue could be shown to be no more profitable than those in which conventional brokerage firms engage.

[6] See *E.H. Rollins & Sons, Inc.*, 18 SEC 380 (1945), *Thomas Arthur Stewart*, 20 SEC 1961 (1945), *Russell L. Irish*, Securities Exchange Act Release No. 7687 (Aug. 27, 1965), aff'd 367 F. 2d 637 (9 Cir. 1966), cert. denied 386 U.S. 911, *Shearson Hammill & Co.*, Securities Exchange Act Release No. 7743 (Nov. 12, 1965).

any security on which it may earn a greater-than-average profit even if that security is most suitable.

Assuming that the Commission may indeed define the anti-fraud provisions of the law in that manner, and assuming that such redefinition can have prospective effect, the question of concern here is whether it can have retroactive effect. May a course of conduct in the years 1960-1964, which had by then not been held to be unlawful, result in a punitive sanction being imposed in 1971?

This Court has said, in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes", that "[a]ll are entitled to be informed as to what the State commands and forbids." At 453. And in *Watkins v. United States*, 354 U.S. 178 (1957), the Court stressed that among the rights guaranteed by the Constitution is "the right to have available, through a sufficiently precise statute, information revealing the standard of criminality before the commission of the alleged offense." At 208. That this rule, the rule against vagueness, applies also in administrative proceedings which can result in punitive sanctions was decided in *Jordan v. DeGeorge, op. cit.* As the Commission continues to escalate the "ever-developing standards of the securities industry", it is vital that this Court define the Constitutional and statutory limitations which the Commission

must respect before it imposes the penalty of a lifetime bar for a newly-defined offense.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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